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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SIAWASH VINCENT
GHASSEMINEZHAD,

Defendant and Appellant.

H045713

(Santa Clara County
Super. Ct. No. C1630459)

I. INTRODUCTION

After the trial court denied his motion to quash and traverse the search warrant and to suppress evidence, defendant Siawash Vincent Ghasseminezhad pleaded no contest to three counts of possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1);¹ possession for sale of cocaine (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of heroin (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of methamphetamine (§ 11378) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of hydrocodone (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of alprazolam (§ 11375, subd. (b)(1)) while armed

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

with a firearm (Pen. Code, § 12022, subd. (a)(1)); possession for sale of oxycodone (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); four counts of possession of an assault weapon (Pen. Code, § 30605, subd. (a)); receiving a large capacity magazine (Pen. Code, § 32310, subd. (a)); and misdemeanor possession for sale of marijuana (§ 11359, subd. (b)). Defendant was placed on probation for three years and ordered to serve one year in jail.

On appeal, defendant contends that the trial court did not conduct an in camera hearing into the potential merits of his motion to traverse and quash the warrant as required by the California Supreme Court in *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*). For reasons that we shall explain, we will conditionally reverse the judgment and remand the matter for the trial court to conduct in camera proceedings in accordance with the guidelines set forth in *Hobbs*.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Warrant*

On January 29, 2016, Agent William Jurevich of the Santa Clara County Specialized Enforcement Team (SCCSET) applied for and received a warrant to search defendant's person, vehicles, and residence on Hillwood Lane in Morgan Hill. The application contained an affidavit by Agent Jurevich, with a Statement of Probable Cause (exhibit A) and a Supplemental Probable Cause Statement (exhibit B) attached.

In exhibit A, Agent Jurevich stated that within the last 10 days, he received information that defendant was engaged in the sale and distribution of heroin in violation of sections 11351 and 11352. Agent Jurevich further stated that he was being assisted in the investigation by other SCCSET agents, as well as confidential sources.

Agent Jurevich requested that the affidavit and exhibit B be precluded from public record pursuant to Evidence Code sections 1040 through 1042 and *Hobbs*. The agent stated that additional information pertaining to the confidential sources was contained in exhibit B and if made public, would compromise ongoing investigations, likely resulting

in the destruction of evidence, flight of co-conspirators, and the potential harassment and intimidation of witnesses and confidential sources.

The warrant request was approved by Judge Javier Alcalá, who also ordered that exhibit B be sealed.² On February 3, 2016, Agent Jurevich searched the residence on Hillwood Lane and defendant. The agent found a variety of illegal narcotics and firearms. A felony complaint was filed against defendant on February 5, 2016. On February 16, 2016, Judge Alcalá again ordered exhibit B sealed.

B. The Motion to Unseal

On May 9, 2016, defendant moved the trial court to either: (1) unseal exhibit B in its entirety, or (2) perform a *Hobbs* review in camera to determine if there were any deficiencies that would render exhibit B insufficient to establish probable cause. On October 26, 2016, the parties appeared in front of Judge Jesus Valencia Jr. and agreed to the court's review of exhibit B in camera outside of defendant's presence.

The in camera hearing was held by Judge Valencia on October 28, 2016. The transcript of the hearing was sealed.

On November 9, 2016, Judge Valencia provided a redacted copy of exhibit B to the district attorney for distribution.³ The record on appeal does not include Judge Valencia's ruling, if any, on defendant's request for a *Hobbs* review.

C. The Motion to Quash and Traverse the Warrant and to Suppress Evidence

On September 15, 2017, defendant, represented by new counsel, filed a motion to quash and traverse the search warrant and to suppress evidence.⁴ The motion was heard on October 31, 2017 by Judge Alcalá, who initially issued the search warrant.

² Because several different judges heard multiple motions in this case, we identify the judges who presided over the hearings relevant to the issues on appeal for clarity.

³ The November 9, 2016 minute order states solely: "Redacted copy given to the DA to distribute."

⁴ Defendant's motion was entitled, "Notice of Motion; Motion to Suppress (P.C. § 1538.5) (*Hobbs*)."
(Bold & capitalization omitted.)

At the motion hearing, the parties appeared to believe that Judge Alcala had presided over the hearing on defendant's 2016 motion to unseal, rather than Judge Valencia. The following exchange occurred:

“[DEFENSE COUNSEL]: [At] the preliminary examination it's my understanding that Your Honor had made the preliminary analysis as to whether or not certain portions of the warrant could be unsealed, and I believe certain portions of the warrant were unsealed.

“THE COURT: I see. And I did that[?]”

“[DEFENSE COUNSEL]: I think you did that, yes.

“[PROSECUTOR]: Yes.”⁵

Defense counsel requested that the trial court investigate the credibility of the confidential informant and the truthfulness of the affidavit, to which the court replied, “What am I supposed to investigate? [¶] . . . [¶] . . . I am looking just at the four corners of this warrant. [¶] . . . [¶] . . . I have no idea what I am supposed to investigate. . . . [¶] I reviewed the sealed portion of the warrant. I unsealed portions of it. While I was looking at the entire warrant . . . if there was something I saw defective that could benefit the defense I would have unsealed that as well. [¶] . . . I do find that there was probable cause by looking at the entire warrant, the unsealed and []sealed portions.”

A lengthy discussion ensued between the trial court and the parties regarding the proper procedure for conducting a *Hobbs* hearing on a motion to quash or traverse. Defense counsel stated that finding probable cause in the warrant is only the first step in the *Hobbs* procedure, and requested the court to also “look at . . . prior police reports, look at prior evidence, then you have to actually question the informant himself. You can't rely upon the affiant saying everything you told me is absolutely represented true in

⁵ The record reflects that the preliminary hearing was actually before Judge Brian Walsh.

this affidavit. You can't rely on that. Because we have made a factual prima facie showing under *Hobbs* that it's not true. And that requires the Court to undertake the next analysis." (Italics added.)

The discussion ended with the trial court stating, "I am offering you the opportunity [to] present any evidence right now to attack the validity of the warrant in any way whatsoever. But you say you don't have anything either through witnesses or documents or something like that? [¶] . . . [¶] . . . I am not going to make the investigation that you are asking me to do, which is to order up everything that the informant's ever done in his life for the police and then me go over it with a fine tooth comb. I don't think I need to do that."

When defense counsel asked whether the trial court had questioned the affiant or any informants, the court responded, "Well, I did a *Hobbs* review is what I did with the affiant. And that's where I looked it over as best [as] I could trying to see if there were any defects or anything that could be of assistance to you, balancing it with the need to keep the informant information confidential. So reaching that balance I disclose what I can. Then the rest is up to you to bring these type of motions. But in my opinion, the Court's duty is done at that point." (Italics added.)

Defendant's motion to quash and traverse the search warrant and to suppress evidence seized was denied.

D. Charges, Conviction, and Sentence

Defendant was charged with three counts of possession of a controlled substance while armed with a firearm (§ 11370.1); possession for sale of cocaine (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of heroin (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of methamphetamine (§ 11378) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of hydrocodone (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); possession for sale of alprazolam (§ 11375, subd. (b)(1))

while armed with a firearm (Pen. Code, § 12022, subd. (a)(1)); possession for sale of oxycodone (§ 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); four counts of possession of an assault weapon (Pen. Code, § 30605, subd. (a)); receiving a large capacity magazine (Pen. Code, § 32310, subd. (a)); and misdemeanor possession for sale of marijuana (§ 11359, subd. (b)).

On December 13, 2017, defendant pleaded no contest to all charges and admitted the arming allegations. Defendant was placed on probation for three years and ordered to serve one year in jail.

On March 28, 2018, defendant filed a notice of appeal based on the denial of his motion to quash and traverse the search warrant and to suppress evidence.

III. DISCUSSION

Defendant argues that the trial court did not conduct an in camera inquiry into the merits of his motion to traverse and quash the search warrant as required by *Hobbs*. Respondent contends that a *Hobbs* review was conducted pursuant to defendant's motion to unseal, and a second *Hobbs* review was not required to address defendant's motion to quash and traverse.

A. Standard of Review

On a properly noticed motion by the defendant seeking to quash or traverse a search warrant, the trial court shall conduct an in camera hearing pursuant to Evidence Code section 915, subdivision (b) and the guidelines set forth by the California Supreme Court in *Hobbs*. (*Hobbs, supra*, 7 Cal.4th at p. 972.) On appeal, the trial court's decision to conduct an in camera *Hobbs* hearing is reviewed for an abuse of discretion. (*People v. Galland* (2004) 116 Cal.App.4th 489, 490-491 (*Galland I*); see also *Hobbs, supra*, at p. 976.)

B. Hobbs Procedure

Penal Code section 1534, subdivision (a) provides that the contents of a search warrant, including the supporting affidavit, become public record once the warrant is

executed and returned. However, a major portion—or even all—of the search warrant may be sealed to protect the identity of a confidential informant under Evidence Code section 1040 et seq. In *Hobbs*, our high court established procedures to preserve the defendant’s right to challenge the validity of a sealed search warrant or affidavit. (*Hobbs*, *supra*, 7 Cal.4th at pp. 971-975.)

When a defendant seeks to quash or traverse a warrant and a portion of the supporting affidavit has been sealed, the relevant materials are to be made available for in camera review by the trial court. (*Hobbs*, *supra*, 7 Cal.4th at p. 963.) No preliminary showing is required if all or a major portion of the search warrant or affidavit has been sealed, and the court is to treat the matter as if the defendant has made the preliminary showing necessary to be entitled to an in camera hearing. (*Galland I*, *supra*, 116 Cal.App.4th at pp. 494-495.) “The prosecutor may be present . . . [but] defendant and his counsel are to be excluded unless the prosecutor elects to waive any objection to their presence. [Citation.] Defense counsel should be afforded the opportunity to submit written questions, reasonable in length, which shall be asked by the trial judge of any witness called to testify at the proceeding.” (*Hobbs*, *supra*, at p. 973.)

Due to its sealed status, the defense may be completely ignorant of all critical portions of the affidavit and therefore be unable to specify what materials the trial court should review in camera. (*Hobbs*, *supra*, 7 Cal.4th at p. 973.) “The court, therefore, must take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires. The materials will invariably include such items as relevant police reports and other information regarding the informant and the informant’s reliability. [¶] Furthermore, because the defendant’s access to the essence of the affidavit is curtailed or possibly eliminated, the lower court may, in its discretion, find it necessary and appropriate to call and question the affiant, the informant, or any other witness whose testimony it deems necessary to rule upon the issues.” (*Ibid.*) This

procedure ensures a fair balance between the public's need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant. (*Id.* at p. 972.)

At the in camera hearing, the trial court must first determine whether sufficient grounds exist to maintain the confidentiality of the informant's identity. (*Hobbs, supra*, 7 Cal.4th at p. 972.) Then, the court must determine whether the entirety of the affidavit or any portion thereof is properly sealed, i.e., whether the extent of the sealing is necessary to avoid revealing the informant's identity. (*Ibid.*) If the court finds that any portion of the sealed affidavit can be further redacted and the remaining excerpted portion made public without divulging the informant's identity, such additional limited disclosure should be ordered. (*Id.* at p. 972, fn. 7.) If critical parts of the sealed affidavit are disclosed to the defense, then there is no need for further unsealing of confidential material or for the court to act on the defendant's behalf. (*People v. Heslington* (2011) 195 Cal.App.4th 947, 958-959 (*Heslington*).) Instead, the motion should proceed to decision with a further evidentiary hearing if necessary. (*Id.* at p. 959.)

In the event that the trial court finds the affidavit to have been properly sealed, the court must then consider in camera the motion to quash or traverse. (*Galland I, supra*, 116 Cal.App.4th at p. 493.) If the defendant has moved to traverse the warrant, the court should determine whether public and sealed portions of the search warrant affidavit, as well as any testimony offered at the in camera hearing, show a reasonable probability that “(1) the affidavit included a false statement made ‘knowingly and intentionally, or with reckless disregard for the truth,’ and (2) ‘the allegedly false statement is necessary to the finding of probable cause.’ ” (*Hobbs, supra*, 7 Cal.4th at p. 974.) If the court determines that the materials and testimony before it do not support a finding of material misrepresentation, the trial court should simply report this conclusion to the defendant and enter an order denying the motion to traverse. (*Ibid.*)

Similarly, if the defendant has moved to quash the search warrant, the trial court should determine whether “under the ‘totality of the circumstances’ presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was ‘a fair probability’ that contraband or evidence of a crime would be found in the place searched pursuant to the warrant.” (*Hobbs, supra*, 7 Cal.4th at p. 975.)

As to both types of motions, if the trial court finds that there is a reasonable probability the defendant will prevail, the court must give the district attorney a choice to either “(1) consent to full disclosure of the sealed materials, in which case the motion proceeds ‘to decision with the benefit of this additional evidence, and a further evidentiary hearing if necessary,’ or (2) refuse to disclose the confidential information, in which case the court must grant the defendant’s motion.” (*Heslington, supra*, 195 Cal.App.4th at pp. 957-958, italics omitted.)

“In all instances, a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible appellate review. [Citation.]” (*Hobbs, supra*, 7 Cal.4th at p. 975.)

C. Analysis

Defendant’s motion to quash and traverse the warrant and to suppress evidence was filed on September 15, 2017. This motion was heard by Judge Alcala on October 31, 2017. Although Judge Alcala was incorrectly informed by counsel that at the preliminary hearing he “had made the preliminary analysis as to whether or not certain portions of the warrant could be unsealed” and Judge Alcala stated that he had conducted a *Hobbs* review with the affiant, we cannot find a minute order in the record reflecting that such an in camera hearing occurred on October 31, 2017 or on any other date.⁶ Nor is there a

⁶ Judge Alcala did review the search warrant, the affidavit, and the probable cause (continued)

sealed transcript from such a hearing or a sealed affidavit. The only sealed transcript in the record is from the October 28, 2016 hearing before Judge Valencia based upon defendant's motion to unseal.

The Fourth District Court of Appeal has ruled that such omissions in the record indicate that the trial court did not conduct a *Hobbs* mandated analysis. (*Galland I, supra*, 116 Cal.App.4th at p. 494.) In *Galland I*, the defendant moved the court “ ‘for an order to inspect the sealed affidavit’; ‘an order unsealing any or all of the sealed affidavit that is no longer privileged’; ‘an order quashing or traversing’ the search warrant; and an order suppressing the evidence seized pursuant to the challenged warrant.” (*Id.* at 491.) The defendant specifically requested that the court conduct an in camera review of the sealed warrant materials, and to have a sealed transcript of the in camera proceeding prepared and retained for appellate review. (*Ibid.*) The trial court denied his request and the motion in its entirety. (*Id.* at p. 492.)

The *Galland I* court determined, “[I]t is quite clear from the record that the trial court did not engage in any in camera review in connection with Galland’s motions challenging the validity of the search warrant. There is no minute order reflecting such an in camera hearing occurred, nor is there any sealed transcript from an in camera hearing related to the search issues. Even more telling, the sealed affidavit itself is not part of the record on appeal. We can only conclude from this omission that the trial court never even looked at the affidavit, much less engaged in the *Hobbs*-mandated careful analysis of the sealing issues and other questions raised by Galland’s motions to traverse and quash the search warrant.” (*Galland I, supra*, 116 Cal.App.4th at p. 494, fn. omitted.) The court declared that this error by the trial court stopped the appeal

statements when he issued the search warrant on January 29, 2016, and ordered exhibit B sealed. Judge Alcala again ordered exhibit B sealed on February 16, 2016. There is no transcript in the record from either date.

“in its tracks.” (*Id.* at p. 492.) The order denying defendant’s motions was reversed. (*Id.* at p. 491.)

Here, had an in camera hearing been conducted after defendant filed his motion to quash and traverse on September 15, 2017, a sealed transcript of the proceeding, as well as any other sealed or excised materials, should have been retained in the record for possible appellate review as ordered by the high court in *Hobbs*. (*Hobbs*, *supra*, 7 Cal.4th at p. 975.) Without such records, “[w]e can only conclude” that a *Hobbs* mandated in camera hearing did not occur. (*Galland I*, *supra*, 116 Cal.App.4th at p. 494.) Moreover, without such critical evidence, the appellate record is not adequate to permit meaningful appellate review of the validity of the warrant. (See *People v. Galland* (2008) 45 Cal.4th 354, 370.)

The Attorney General contends that the October 28, 2016 in camera review conducted pursuant to defendant’s motion to unseal satisfies the *Hobbs* requirements and that a second in camera review was not necessary to address defendant’s motion to quash and traverse the warrant. However, the October 28, 2016 review was conducted by Judge Valencia, not Judge Alcala, and occurred nearly one year before defendant filed his motion to quash and traverse the warrant. Although Judge Valencia impliedly ruled on defendant’s motion to unseal by giving a redacted copy of exhibit B to the prosecutor to distribute, he did not rule on defendant’s request to determine whether there were any deficiencies that would render exhibit B insufficient to establish probable cause. Judge Valencia’s in camera review therefore does not satisfy the *Hobbs* requirements.

For all of these reasons, we conclude that the trial court erred by failing to conduct an in camera review based upon defendant’s motion to quash and traverse the search warrant and request for a *Hobbs* hearing.

IV. DISPOSITION

The judgment is conditionally reversed and the matter is remanded for the trial court to conduct in camera proceedings in accordance with the guidelines set forth in *People v. Hobbs* (1994) 7 Cal.4th 948.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Ghasseminezhad
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